Long-Range Planning for Circuit Councils

SPEECHES PRESENTED AT THE MEETING OF THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT
MAY 1992

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Speeches presented at the meeting of the Judicial Council of the Ninth Circuit, May 1992

Chief Judge J. Clifford Wallace
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Introduction

On May 21–22, 1992, the Judicial Council of the Ninth Circuit met at Salish Lodge, Washington, for a conference on long-range planning. At the request of Chief Judge J. Clifford Wallace, the Long-Range Planning Committee of the Judicial Conference of the United States, the Long-Range Planning Office of the Administrative Office of the U.S. Courts, and the Federal Judicial Center participated in the conference. It was the consensus of the participants that the papers presented at the conference may be of value to other circuit councils considering long-range planning. Accordingly, at the request of Judge Otto R. Skopil, Jr., the chair of the Judicial Conference's Long-Range Planning Committee, and in cooperation with the Administrative Office of the U.S. Courts, we are pleased to publish the papers.

WILLIAM W SCHWARZER

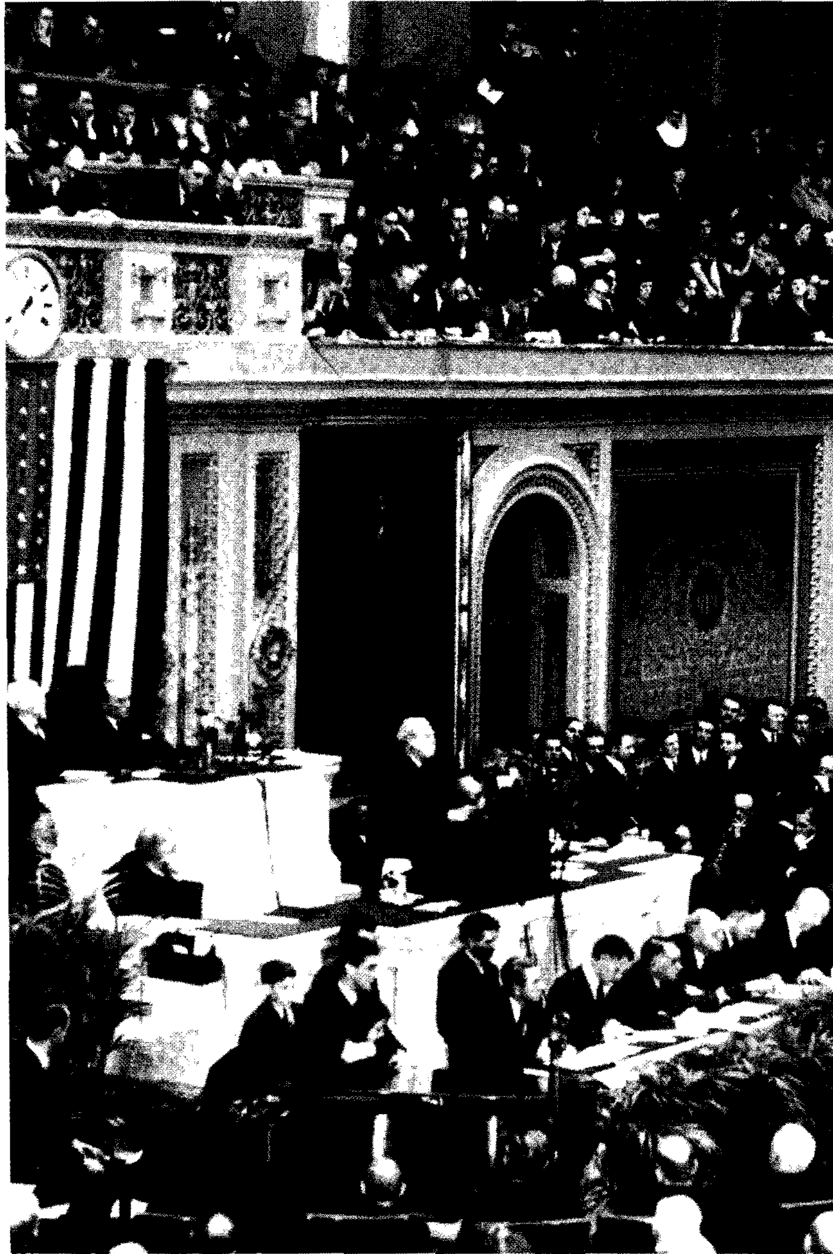
The Future of the Judicial Council of the Ninth Circuit—Until 1939

Russell Wheeler

This brief paper analyzes some of the reasons and forces that led to the creation of the judicial council as an institution of federal court governance, examining particularly the situation in the Ninth Circuit.

The study of history is a good first step in beginning a planning process. To study an institution's past is to learn something about its culture, about underlying social and political conditions that explain it and that must be accounted for in any effort to change or to preserve the institution. History also yields instructive case studies, not only about whether—but about how and why—people achieved (or didn't achieve) their articulated or unarticulated goals for the future; about whether their assumptions panned out about what the future would bring; about the strengths and weaknesses of the strategies and devices they adopted to effect change. Finally, studying history lends a certain dose of humility to those involved in any planning exercise. History reminds us, for example, that some of the current provisions and proposals about how to structure and administer the federal courts, ideas that seem so sensible today, will appear as quaint and curious to our descendants as the ideas of our ancestors appear to us. All these lessons should be helpful to those who would plan for the future.

The creation of the councils also certainly bears out Justice Holmes's aphorism that a page of history is worth a volume of logic, and reminds us that planning is a political process. It is not simply a mechanical process of implementing well-ordered designs for change and plotting out trend lines. The 1939 statute creating the councils was the result of an amalgam of conflicting visions of federal judicial administration held by major judicial, executive, and legislative branch figures in the 1920s and 1930s. Moreover, those visions took shape in the context of historical practices and relationships that emerged in the nineteenth century.



Chief Justice Charles Evans Hughes addressing both houses of Congress on March 4, 1939. His speech was carried nationwide over radio. (photograph courtesy the Collection of the Supreme Court of the United States)

I

On August 7, 1939, President Roosevelt signed "An Act to provide for the administration of the United States Courts, and for other purposes." It added to title 28 a new chapter 15, entitled "The Administration of the United States Courts."[1] That statute created the Administrative Office of the U.S. Courts. It directed each circuit's senior circuit judge—now called the chief judge—to convene the rest of the circuit judges at least twice a year as a circuit council. And it mandated an annual judicial conference of all judges and some number of lawyers. The bill, in gestation for over four years, reflected a widely felt need to remove the administration of the federal courts from the Department of Justice and to strengthen the courts' management structures but it also reflected widely divergent views as to how to do it.

What would appear to be an unrelated event occured five months earlier, on March 4, 1939, when Chief Justice Charles Evans Hughes addressed both houses of Congress on a national radio hook-up.[2] The specific occasion of this address had little to do with federal judicial administration. It celebrated the 150th anniversary of the convening of the first Congress.

Nevertheless, Hughes revealed something of why he liked the idea of the council. He told his national audience that "We have a national government equipped with vast powers which have proved to be adequate to the development of a great nation, and at the same time maintaining the balance between centralized authority and local autonomy." But authority and competence was necessary on the local level as well. Thus, he added, "[o]ur states, each with her historic background and supported by the loyal sentiment of her citizens, afford opportunity for the essential activity of political units, the advantages of which no artificial territorial arrangement could secure."

Decentralization, in other words, is important. At first blush, however, this disparaging reference to "artificial territorial arrangements" sounds somewhat discordant in light of the fact that at this same time—March 1939—Hughes was probably working with the Senate Judiciary Committee to secure passage of a bill vesting judicial governance

1. Pub. L. No. 200, 53 Stat. 1223 (1939).
2. Congressional Record, March 4, 1939, 2249ff.

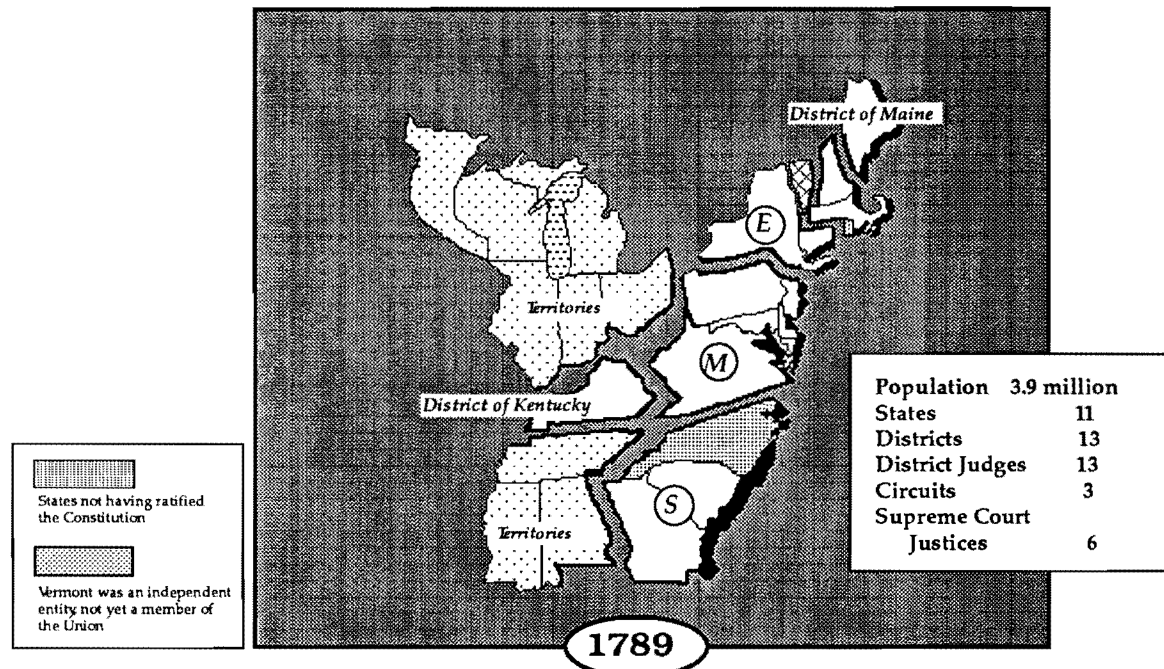
authority not in the Supreme Court but in the circuits. The circuits would seem to be prime examples of "artificial territorial arrangements." In fact, Hughes recognized that the circuits, at least by 1939, were in some ways not "artificial" but had become integral, indeed natural, elements of the third branch of government. In other words, the idea of vesting judicial administrative authority in circuit-based institutions did not simply show up on the legislative doorstep in 1939 as a gift from the stork of court governance. Rather, the concept reflects the influence of two important characteristics of the federal judiciary. One is that the circuit is the basic geographic subdivision for governance. The other is that individual courts should be subject to some administrative control and governance by other bodies.

II

Understanding how these two ideas evolved tells us much of the underpinnings of the circuit council, and why the mid-1930s effort to restructure the federal courts' administration produced the statute that Roosevelt signed in August 1939.

Today we think of federal judicial circuits as sources of law that complement the national law, as well as the geographic subdivisions of the federal courts. Circuits were originally created, though, as devices by which to allocate a major duty of Supreme Court justices—the duty to serve as the system's major trial court judges as well as its only appellate judges.[3] The 1789 Judiciary Act—which Hughes called in his March address "one of the most satisfactory acts in the long history of notable congressional legislation . . . next in importance to the Constitution itself"—divided the nation into three judicial circuits and thirteen districts, for eleven states and two territories. It organized the Supreme Court and created two other courts—district courts, which were mainly admiralty courts, and circuit courts, which were the major trial courts. It directed Supreme Court justices and district judges to serve together as the judges of the circuit courts. The justices would travel around their circuits and, with the respective district judge, hold circuit court in each of the districts of the circuit. The nomenclature that gradually evolved was the "circuit court for the district of Mas-

3. The historical summary here is presented in more detail in R. Wheeler & C. Harrison, Creating the Federal Judicial System (Federal Judicial Center 1989), and the sources cited there.



The First Judiciary Act created 13 districts and placed 11 of them in 3 circuits: the Eastern, Middle, and Southern. Each district had a district court, a trial court with a single district judge and primarily admiralty jurisdiction. Each circuit had a circuit court, which met in each district of the circuit and was composed of the district judge and two Supreme Court justices. The circuit courts exercised primarily diversity and criminal jurisdiction and heard appeals from the district courts in some cases. The districts of Maine and Kentucky (parts of the states of Massachusetts and Virginia, respectively) were part of no circuit; their district courts exercised both district and circuit court jurisdiction.

sachusetts," for example, and the "circuit court for the district of Maryland."

Thus the circuit, for at least half our history, was not a jurisdictional entity: Judge Friendly's concept of the "law of the circuit"[4] would have been irrelevant. Rather, the circuit was simply a basis for work allocation. The concept of circuits came from English and colonial practice as a device for efficient use of judges when a jurisdiction needed more places of holding court than it had full-time judges. Circuit-riding by Supreme Court justices was also seen as a way of promoting contact between the citizenry and local bars and the high officials of the government, to the benefit of both.

The circuits were gradually transformed from the "artificial territorial arrangements" created in 1789 to the integral elements of federal judicial administration in which the 1939 statute vested governance authority. At first there were three circuits, the Eastern, Middle, and Southern, with two supreme court justices assigned to each. In 1802, Congress changed the assignment to one justice per circuit, thus doubling the circuits to six, and identified them by number rather than name. Then, as the country grew, Congress added circuits and expanded the Supreme Court to provide justices for the circuits. Because of the rapid growth of California, Congress made it a circuit unto itself in 1855, a tenth, unnumbered circuit. But rather than add a tenth justice, it authorized the appointment of a separate circuit judge, Matthew Hall McAllister, the first circuit judge per se in the country, who came to California from Georgia in the 1840s.

Congress abolished the separate California circuit in 1863, created a tenth, numbered circuit, and expanded the Supreme Court to ten justices. But to keep Andrew Johnson from appointing anyone to the Court, Congress eventually reduced its size to nine, where it has stayed since.[5] Between the Civil War and 1891, there was considerable debate about whether to restructure the federal judicial system, perhaps even abandon the circuits. The eventual resolution, however, as is well known, was the 1891 Evarts Act, creating in each circuit a separate appellate court, a "circuit court of appeals" with its own judges, thus bringing order to the chaos that had developed under the old system

4. Friendly, *"The Law of the Circuit" and All That*, 46 St. John's L. Rev. 408 (1972).

5. In 1869, it created nine separate circuit judges, recognizing that the justices were simply unable to keep up with the growing Supreme Court workload and steadily attend the circuit courts as well, but those nine extra judges were too few to help.

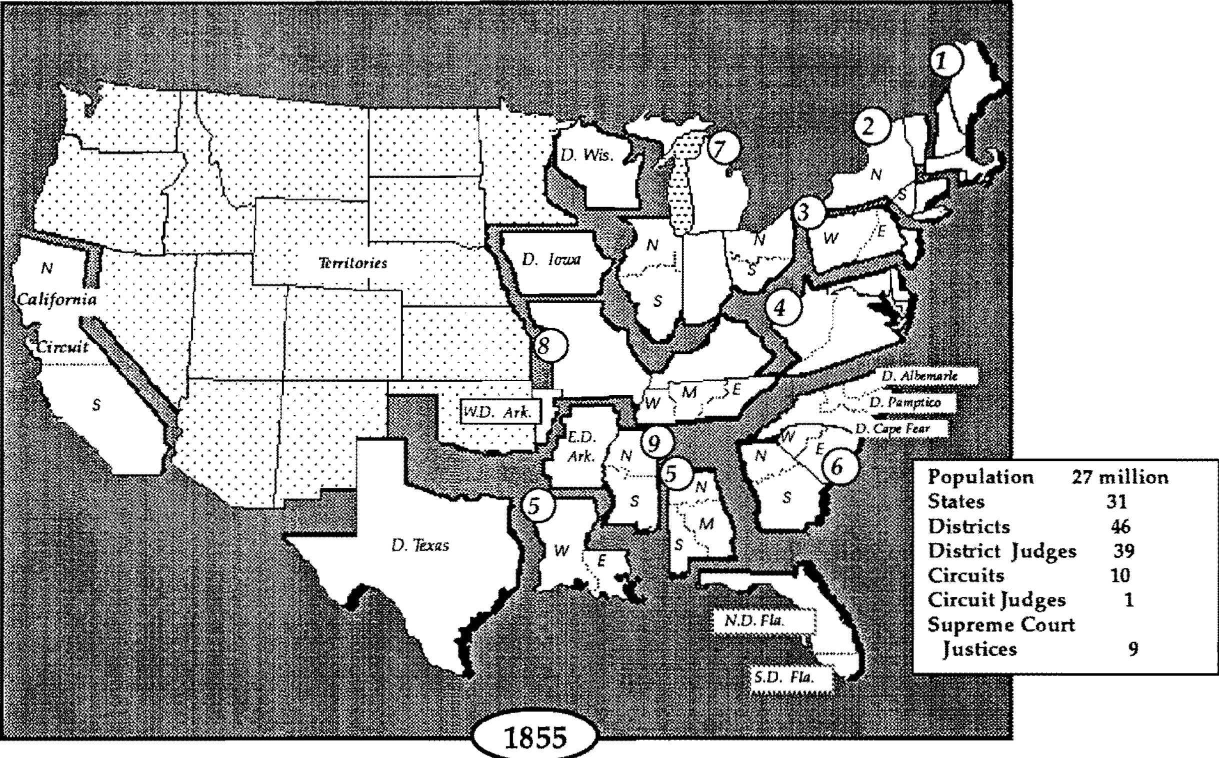
and solidifying the circuits as basic building blocks of the federal judicial organization.

In 1866, Congress restructured the circuits in essentially the same form they have today, thus providing them some stability and the opportunity to develop their own judicial and political cultures. Only ten years earlier, the first and second circuits had taken the form they have today, but otherwise things were quite different. The Ninth Circuit, for example, was Mississippi and Arkansas—and it separated the two states of the Fifth Circuit, Louisiana and Alabama. Other states, such as Florida and Texas, didn't get assigned to circuits, not so much because of logic but congressional inattention. Even in 1863, Illinois, Wisconsin, and Michigan constituted the Eighth Circuit, and Arkansas, Louisiana, Texas, Tennessee, and Kentucky were the Sixth Circuit. But by 1866, all the states then in the Union were in circuits numbered and essentially structured as they would be in 1891, in 1939, and even today—save for the creation of the Tenth Circuit in 1929 and the Eleventh in 1980.

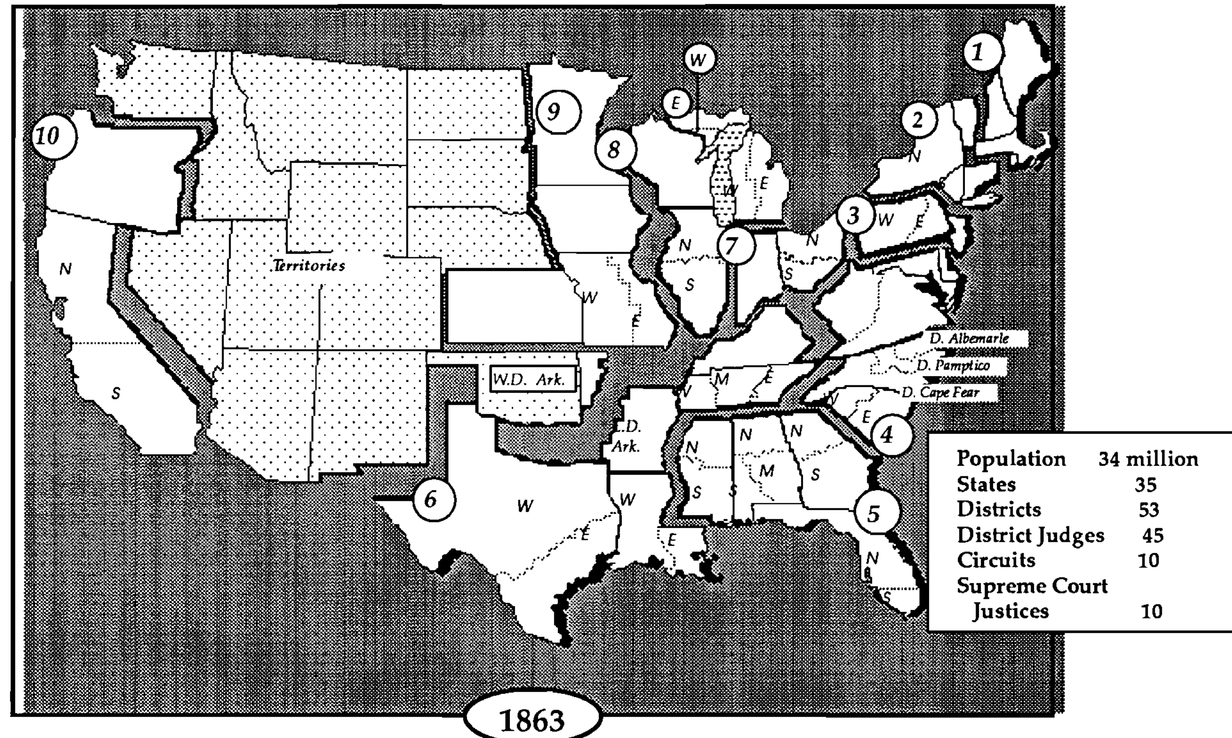
III

Against this backdrop, we can begin to analyze the evolution of conditions and of specific thinking that led to the 1939 statute creating the circuit councils. To drive home a point, I will posit that the first Ninth Circuit judicial council—speaking functionally—was Justice Stephen Field, son of New York lawyer David Dudley Field, immigrant to California in the 1840s, later chief justice of California, appointed to the U.S. Supreme Court in 1863 as a Democrat by Republican Abraham Lincoln to be the tenth Justice of the Supreme Court, where he served until 1897. Field's relationship with the judges of the Ninth Circuit gives a clue to the relationships solidified by the 1939 statute.

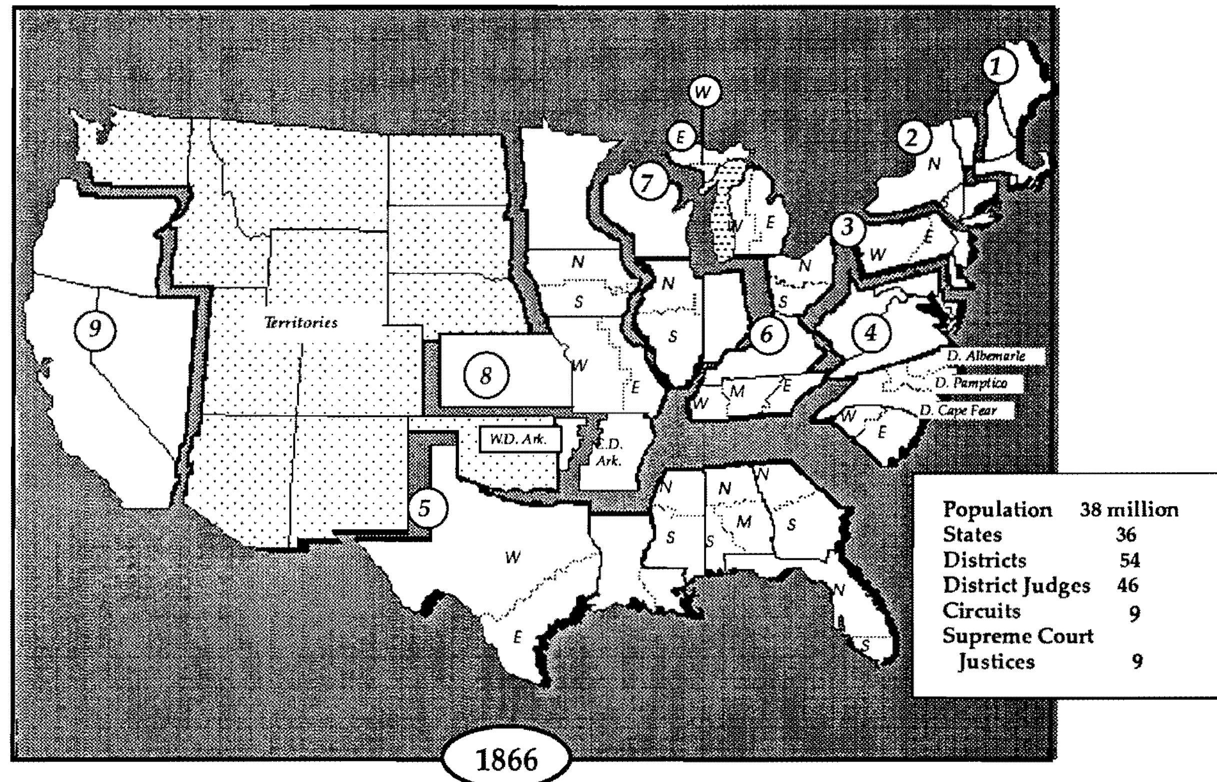
During the nineteenth century, district judges were largely autonomous, running their courts largely as they pleased, often serving as the sole circuit judge as well as district judge, subject to occasional administrative oversight by the Department of Justice. To varying degrees, however, they were under the watchful eye of the Supreme Court justice assigned to the circuit. Even though the circuit justices attended the circuit courts less and less, they took their role seriously. In fact, in 1868, Chief Justice Chase observed that "it is only as a Circuit



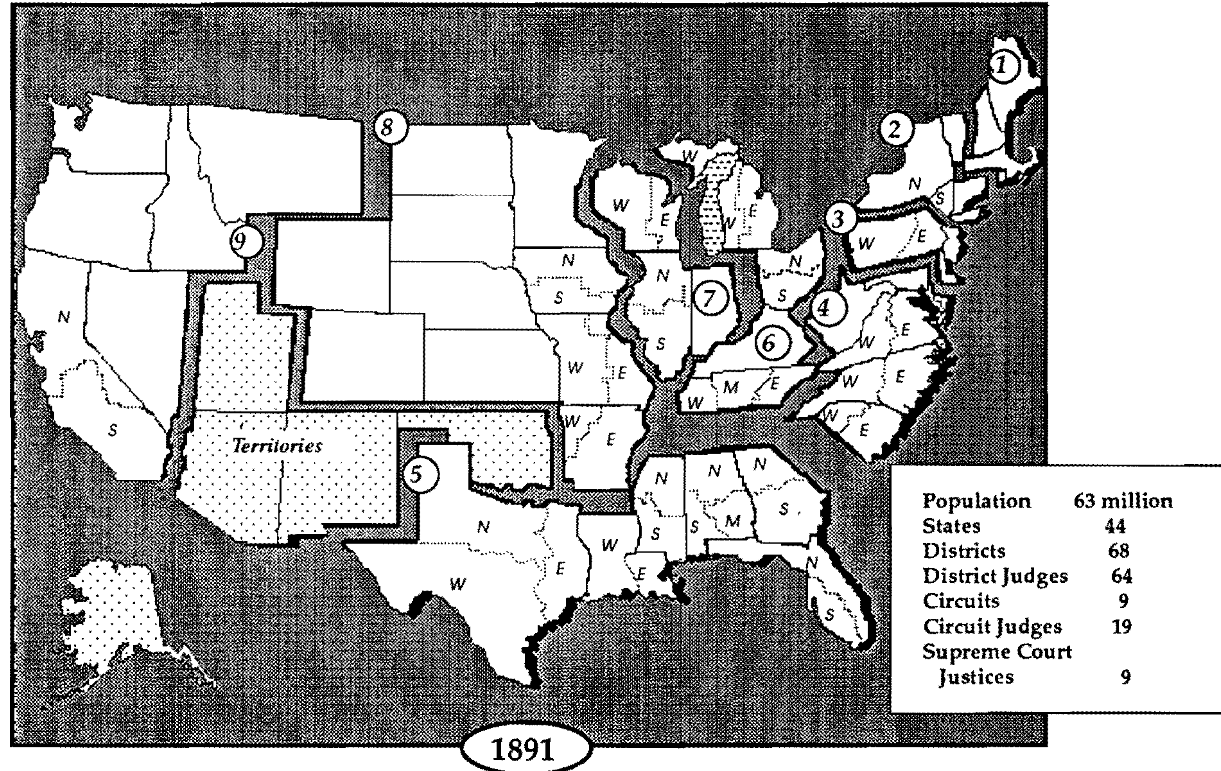
In 1855, Congress created a separate judicial circuit, "constituted in and for the state of California, to be known as the circuit court of the United States for the districts of California," with the same jurisdiction as the numbered circuits. Rather than increasing the number of Supreme Court justices, Congress authorized a circuit judgeship for the circuit.



In 1862, Congress added the states that had been admitted since 1842 to existing circuits. The following year, Congress abolished the Circuit Court for California and created the Tenth Circuit, consisting of California and Oregon. One justice was added to the Supreme Court for this circuit.



After the Civil War, Congress reduced the number of circuits to nine, adding Nevada to the new Ninth Circuit, formerly the Tenth. By law, Congress sought to limit the size of the Court by prohibiting appointments until the Court reached an authorized size of six associate justices, plus the Chief Justice. Congress restored the Supreme Court to nine justices in 1869, at the same time creating a circuit judge for each of the nine circuits "who shall reside in his circuit, and shall possess the same power and jurisdiction therein as the justice of the Supreme Court alloted to the circuit." Between 1867 and 1929, newly admitted states were added to either the Eighth or the Ninth Circuit.



By the year in which Congress created the Circuit Courts of Appeals, the United States numbered 44. Utah, Oklahoma, Arizona, and New Mexico joined the Union within the next two decades, making the continental United States complete. Arizona was added to the Ninth Circuit; the other three states joined the Eighth. In 1911, Congress abolished the old circuit courts, which had exercised only trial jurisdiction since 1891.

Judge that . . . any . . . Justice of the Supreme has, individually, any considerable power."[6]

For example, Chase told a judge in his circuit, the Fourth, to "take up and decide" a case because "under the circumstances, [it] . . . as well as the others should, perhaps, be promptly decided." He told another judge, suspected of leaking opinions to the press, that newspaper reporters seemed to "know as much (and probably more) of your opinions and future decisions as you yourself. I take it for granted that you keep your own counsel." And, perhaps anticipating the circuit's modern-day obligation to approve district jury plans, he told a U.S. marshal in post-Civil War North Carolina to take care to select juries free of racial discrimination.[7]

A taste of Justice Field's administrative activities as the Ninth Circuit justice (and informal circuit council) is found in a series of letters between Field and Oregon District Judge Matthew Deady, published about four years ago in *Western Legal History*.[8] Deady came to Oregon by way of Maryland and Ohio and was a substantial legal researcher and publisher before being appointed a district judge. Through Field's letters to him, one gets a sense of a loose administrative hierarchy alongside the litigation hierarchy. The substance is different from what the councils do today, but what comes through clearly is the notion of administrative responsibility—benevolent as it may have been—on the part of the appellate judge, Field, directed to the trial judge, Deady.

Here are some of the things that Justice Field, from Washington, D.C., wrote to Judge Deady, in Portland. In December 1870, an example of the circuit as a communications link: "Now that Congress has assembled I suppose you would like to hear from me as to the prospect of any action to increase our salaries." From the same letter, perhaps a surprising illustration of changing judicial ethics: "I have thought of publishing two volumes of Reports of decisions of the Circuit Court of the ninth Circuit, provided I can secure your cooperation and that of Judge Hoffman. . . . If anything, which is doubtful, should be made from the sale of the volumes, I should expect to divide

6. *Quoted in* P. Fish, The Politics of Federal Judicial Administration 9 (1973).
7. P. Fish, *supra* note 6, at 9–10.
8. *"My Dear Judge": Excerpts from the Letters of Justice Stephen J. Field to Judge Matthew P. Deady*, Western Legal History Winter/Spring, 1988, 79 (edited and annotated by Malcom Clark, Jr.).

Justice Stephen Field in his library. The photograph was taken on his 80th birthday, Nov. 4, 1896. (photograph courtesty the Collection of the Supreme Court of the United States)

the amount with you and Judge Hoffman." In 1888, an example of the circuit as resolver of differences among trial judges over case assignments: Field, referring to the litigation that eventually gave rise to *In re Neagle*,[9] told Deady that he should try the case of David Terry, who had been indicted for assaulting a U.S. marshal: "I am decidedly of the opinion that you be designated and appointed for that purpose [to preside at the trial] and I shall therefore write to Judge Sawyer . . . and tell him to make the designation and appointment so that you may be

9. 135 U.S. 1 (1890).

ready to come down to San Francisco in the month of March next." In 1891, Field wrote: "I was very sorry you were not able to attend the October Term of the Circuit Court of Appeals at San Francisco. I did not like to have the first regular term of that court after its organization fall through, and I was particularly anxious that you should preside in my absence." (This was not an admonition; Deady was dying of cancer.)

IV

Field was writing, in the last passage, about the first term of the new Circuit Court of Appeals. When Congress created separate appellate courts, it immediately set up what Leon Greene once called "a silent and probably unconscious struggle for supremacy" between the district and appellate judges.[10] With the Supreme Court justices relegated gradually to a more distant position, who was going to oversee the district courts? The district courts themselves, as they had been doing with occasional circuit justice intervention, or the newly constituted intermediate appellate courts? The answer to that question, of course, was not dispositively rendered until 1939, when the circuit councils were created, and statutory changes have severely modified that disposition as well. Nevertheless, the nineteenth-century practice of appellate administrative oversight on a circuit basis—weak as it may have been—set the stage for further developments in the twentieth century.

Two things were happening between 1891–1939. First, the new courts of appeals were positioned to begin to exercise governance authority over the district courts, building on the weak traditions established by the circuit justices. In creating the circuit courts of appeals, Congress provided that the judges would preside "in order of the seniority of their respective commissions." That was the beginning of the concept of the "senior circuit judge," as not only a judicial but also an administrative head of the circuit, a concept that led in 1922 to the forerunner of the Judicial Conference of the United States and from that to the circuit councils.

Second, the courts, like other institutions of society in the early twentieth century, became the object of Progressive Movement reformers and their desire to use business principles to change political and government conditions. A major Progressive Movement proposal

10. *Quoted in* P. Fish, *supra* note 6, at 11.

for the judiciary was for a council of judges to exercise superintending authority over the courts, either directly or through a chief judicial manager. John Wigmore proposed in 1916 to make a court like "an efficient commercial house," through appointment of a "chief judicial superintendent . . . who would inquire into each botch product of our justice-system and take measures to improve it against the recurrence of such failures."[11] In 1917, the American Judicature Society published its "Model Judicial Act," which included in its commentary the need for a "judicial council" with "the power to remove from office any judge other than the chief judge, and to reprove [non-chief judges] either privately or publicly, or transfer [them] to some other division of the court for inefficiency, incompetency, neglect of duty, lack of judicial temperament, or conduct unbecoming a judge."[12]

Former President William Howard Taft proposed the same idea for the federal courts, five years before he became Chief Justice. He told the 1916 graduates of the University of Cincinnati Law School that "authority and duty should be conferred upon the head of the Federal judicial system, either the Chief Justice, or a council of judges appointed by him, or the Supreme Court, to consider each year the pending Federal judicial business . . . and to distribute Federal judicial force in the country through the various district and intermediate appellate courts, so that the existing arrears may be attacked and disposed of." He called for "the adjustment of our judicial force to the disposition of the increasing business by introducing into the administration of justice the ordinary business principles in successful executive work, of a head charged with the responsibility of the use of judicial force at places and under conditions where the judicial force is needed."[13]

Taft, once he became Chief Justice in 1921, pushed this same idea, quickly convincing Congress to create the conference of senior circuit judges,[14] which we know today as the Judicial Conference of the United States. In 1916, he had proposed Supreme Court appointment of the

11. Wigmore, *Wanted — A Chief Judicial Superintendent*, 1 J. Am. Jud. Soc'y 7–9 (1917).
12. *The Statewide Judicature Act*, 1 J. Am. Jud. Soc'y 101 (1917), paraphrasing Kales, *Methods of Selecting and Retiring Judges in a Metropolitan District*, in Reform of Administration of Justice, 52 The Annals 1, 11 (1913).
13. Taft, *The Attacks on the Courts and Legal Procedure*, 5 Ky. L.J. 3, 15 (1916).
14. An Act for the Appointment of Additional Circuit Judges for the Fourth Judicial Circuit, for the appointment of additional district judges for certain districts, providing for an annual conference of certain judges, and for other purposes, Pub. L. No. 298, § 2, 42 Stat. 837, 838 (1922).

conference, but by 1921, in a concession to the power of the circuits as an institution, he proposed instead that the conference be an ex officio body of the senior circuit judges.

The 1922 statute created four major responsibilities for the senior judges so convened: Individually, each was to describe the needs of his circuit and how judicial administration there might be improved, and, more specifically, was to provide the conference the statistical reports that the statute required each senior district judge to file, along with recommendations as to the need for temporary judicial assistance in disposing of the "business in arrears." Collectively, the conference was to "make a comprehensive survey of the conditions of business in the courts of the U.S. and prepare plans for assignment and transfer of judges to or from circuits or districts where the state or condition of business dictates the need therefor," and to "submit such suggestions to various courts as may seem in the interest of uniformity and expedition of business."

To give effect to the temporary judgeship needs so revealed, the statute strengthened the system's authority to assign judges temporarily to other courts to clear up dockets. Taft had pressed for the creation of what he called a "flying squadron of judges," judges-at-large available for assignment to courts in need of more support, but that plan died in the face of fears that national judges would not respect local needs and conditions and that such authority was too great to vest in the Chief Justice. "Gentlemen have suggested," Taft complained in the era of the Volstead Act, "that I would send dry judges to wet territory and wet judges to dry territory."[15] The 1922 Act authorized no judges-at-large but did broaden the basis for transferring judges temporarily: to relieve backlogs, not just to help disabled judges. Senior circuit judges (or the circuit justice) could approve temporary intracircuit transfers, and the Chief Justice could approve intercircuit transfers at the request of the senior circuit judge or circuit justice.

In summary, the Conference of Senior Circuit Judges was a national body composed of each circuit's chief judicial administration judge, who was to report to his colleagues on what they could do to improve business in the various circuits. By making the circuits the administrative unit of federal court governance, and by recognizing the senior

15. Taft, *Possible and Needed Reforms in the Administration of Civil Justice in the Federal Circuits*, 6 J. Am. Jud. Soc'y 36, 37 (1922).

circuit judge as a major actor with respect to correcting problems in the district courts, the conference was thus a major step toward the circuit councils.

V

In the 1930s, the question of how to organize the federal courts got heavily wrapped up in President Roosevelt's effort to make the federal judiciary a more willing partner in his agenda to restructure American economic institutions.[16] The most well known manifestation of that effort was the so-called "Court packing plan" to increase the size of the Court by adding a justice for any sitting justice over the age of seventy, ostensibly to help the Court relieve its backlog. But the Roosevelt proposals did not stop with the Supreme Court. His 1937 judiciary bill dealt as well with the perceived inefficiency, arrogance, and poor administration that critics charged pervaded the federal judiciary, a condition due in part but not totally to the Justice Department's role as chief budget officer and administrator of the third branch.

Using words with a contemporary ring, President Roosevelt said, in the same 1937 message that proposed the Court-packing plan, that "A growing body of our citizens complain of the complexities, the delays, and the expenses of litigation in U.S. Courts . . . . Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do."[17]

Thus, the administration's 1937 judiciary proposal dealt not only with the Supreme Court. Sections 2 and 3 would have created judges-at-large, available for assignment by the Chief Justice, and a powerful administrative "proctor" for the federal courts, to be appointed by the Supreme Court and to act under its direction. Although the bill was defeated in 1937, it strengthened the judicial leadership's resolve to find some alternative to the status quo that would also dim enthusiasm for reviving parts of the administration plan. One result was to solidify judicial support for an Administrative Office of the U.S. Courts, to end the long-disliked system of Justice Department administration of the courts but avoid the President's proposal for a proctor. Another result

16. *See generally* P. Fish, *supra* note 6, at 111–24.
17. *Quoted in* P. Fish, *supra* note 6, at 114–15.

was to encourage support for vesting governance authority in the circuits, in councils of judges.

Five factors underlay the judicial leadership's preference for the councils.[18] First, that preference reflected the view, strong even before the judicial council was enacted, that circuit judges bore responsibility for ensuring effective district court administration. There are various instances, pre-1939, of senior circuit judges or other circuit judges prodding district judges to dispose of delayed cases. The statute gave the circuit judges a specific legal authority to direct the district judges to take action. Second, along with creating circuit conferences and directing the Administrative Office to report to the Judicial Conference, the councils reflected Chief Justice Hughes's goal of decentralizing federal judicial administration and separating the Supreme Court from responsibility for misadministration in courts around the country. Hughes argued that "[i]nstead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits." Third, the councils embodied Hughes's view that the "[c]ircuit judges know the work of the district judges by their records that they are constantly examining . . . [and they] know the judges personally in their district; they know their capacities." Fourth, placing authority in a group of judges was preferable to placing it in a single judge. District judges, said Hughes, "would not feel that they were depending upon a single individual . . . and they would feel their requests had consideration of the organization of the circuit." Finally, by creating an agency with what the Eighth Circuit senior judge called "disciplinary powers," Congress sought to spare itself from more of the disruption recently experienced in the 1936 impeachment investigation of Judge Halsted Ritter (S.D. Fla.).

Congress created circuit councils "[t]o the end that the work of the district courts shall be effectively and expeditiously transacted." The statute directed all the judges of the court of appeals to meet at least twice a year as administrative superintendents of the district courts, not as appellate judges in the strict sense. Their task: to review the district court caseload statistics collected by the Administrative Office director

18. *See generally* P. Fish, *supra* note 6, at ch. 4.

and conveyed to them through the senior circuit judge, and to take "such action . . . as may be necessary." The statute created a "duty of the district judges promptly to carry out the directions of the council." There was no reference to acting on circuit court business because the council was the circuit court—and evidently in need of no statutory admonition to administer itself.[19]

There have been several significant changes in the councils since 1939.[20] First, their membership has broadened, from exclusively circuit judges in 1939, to district judge inclusion in 1980, to equal membership (plus the chief judge as chair) in 1990. (And circuit executives were authorized as council staff by a 1971 statute.) Second, the council's mission is broader. In 1948, Congress replaced "the end that the work of the district courts shall be effectively and expeditiously transacted," with the goal of "effective and expeditious administration of the business of the courts within [the] circuit," and directed the district judges to carry out the council's "orders," rather than its directions. In 1980, Congress replaced "the business of the courts" with "justice," thus charging each council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." The 1980 statute also provided the councils with more instruments, including subpoena power and authority to seek contempt citations for judges or court employees who fail to heed the statutory admonition "promptly [to] carry into effect all [council] orders." Congress also broadened the councils' responsibilities through a procedurally elaborate system for considering and acting upon complaints of judicial unfitness.

Both Congress and the Judicial Conference have vested numerous district court oversight responsibilities in the circuit council—from the review and abrogation of local rules,[21] to the creation of "bankruptcy appellate panels,"[22] to approving district court plans for jury selection.[23]

19. Pub. L. No. 200, 53 Stat. 1223 (1939).

20. The current provisions are codified at 28 U.S.C. § 332. Judge Otto Skopil of the Court of Appeals for the Ninth Circuit has documented the various statutory changes affecting the councils in a 1992 paper prepared as part of the Ninth Circuit council's planning activities. Skopil, Report on the Statutory Authority of the Judicial Councils (ms., March 1992).

21. 28 U.S.C. § 2071(c)(1).

22. 28 U.S.C. § 158(b).

23. 28 U.S.C. § 1863(a).

VI

The circuit councils are not simply an idea conceived in the mid-1930s. The basic concepts—of circuits as units of governance and of some circuit-based agency superintending the courts—are built deep into the structure of our courts.

On the other hand, despite the strength they derive from long-standing tradition, in the final analysis, the circuits are "artificial territorial arrangements," the phrase Hughes used in his 1939 address (although he was not characterizing the circuits per se). At the least, they are subject to alteration or abolition by Congress. In that regard, it is well to recall the words of Frankfurter and Landis, describing the Judiciary Act of 1925, but applicable to all statutory elements of court jurisdiction and governance: "Framers of judiciary acts," they wrote, "are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generation."[24] The question now is whether the circuit judicial council is up to the challenge of this generation and the next.

24. F. Frankfurter & J. Landis, The Business of the Supreme Court 107 (1926). Professor Thomas Baker has called attention to the relevance of this observation to the federal courts' current long-range planning efforts in Baker, *Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary*, 23 Tex. Tech L. Rev. 1, 10 (1992).

Challenges in Developing a Long-Range Plan for the Judicial Council of the Ninth Circuit

William W Schwarzer

I

What is a long-range plan? Each of you may have your own answer. Many public and private agencies have labored to produce plans. Their plans have taken all sorts of forms—sometimes an agenda for the future, sometimes a lengthy document analyzing functions and defining missions. Their fate has often been to end up on the shelf gathering dust.

The fact that this has happened to plans in the past does not mean that it has to happen again. Thus the first challenge is to create a plan that will avoid the fate of its predecessors. One response to that challenge may be to make the plan relevant—relevant to the institution it is to serve and to the times in which it is to operate. In their recent book, *Reinventing Government*, David Osborne and Ted Gaebler describe the context in which public institutions must plan:

> Today's environment demands institutions that are extremely flexible and adaptable. It demands institutions that deliver high-quality goods and services, squeezing ever more bang out of every buck. It demands institutions that are responsive to their customers, offering choices of nonstandardized services; that lead by persuasion and incentives rather than commands; that give their employees a sense of meaning and control . . . ." (p. 15)

Those words were not written with Article III courts in mind; rather they were intended to explain why in the present era of breathtaking change, bureaucratic institutions developed in the past increasingly fail us. But when you think about it, those words, slightly revised, speak directly to judicial institutions.

The essence of a meaningful plan, therefore, must be not to freeze an institution in a particular mode but to enable it to meet the demands of today's environment for flexibility and adaptability. The most brilliant plan may become irrelevant overnight—recent history has

demonstrated how sudden and wholly unforeseen changes can totally change the landscape of planning and decision making overnight, rendering existing plans and past decisions irrelevant.

The challenge for planning, therefore, is to create not a document but rather a framework for ongoing decision making responsive to the needs of the time that will help the institution maintain and enhance its capacity to perform its mission. Osborne and Gaebler describe it in this way:

> Strategic planning is not something done once, to develop a plan, but a process that is regularly repeated. The important element is not a plan, but planning. By creating a consensus around a vision of the future, an organization builds a sense of where it is going among its members. (p. 234)

In the case of the circuit council, that means planning to maintain and enhance its capacity, in the words of the statute, to further the effective and expeditious administration of justice within the circuit.

II

In suggesting that in developing your plan, you focus on the process, not the paper, I do not mean to give you an out to escape making difficult decisions. And they will be difficult. It is hard enough to make the decisions for today, tomorrow, and the rest of the year. To anticipate what will be needed a few years down the road is surely a daunting task. But history tells us that it needs to be done. And that brings me to the second challenge: to try to identify those trends that are likely to shape the context for the making of major decisions by the council in the years ahead.

That is not an assignment in crystal ball gazing. Rather it is an exercise in pulling one's head out of the sand and looking around, at the past, the present, and toward the horizon of the future. As the director of planning of NYNEX recently said, "Smart businesses are becoming like good poker players: they pay attention to everything that is happening."

An analysis of the course of events over the past twenty-five years strongly suggests that had the judiciary been alert to the evidence of certain distinct trends, it might have been able to avert some of the adverse developments that have come its way: mandatory sentencing guidelines, the Civil Justice Reform Act, perhaps compulsory financial

disclosure and restrictions. The challenge for the council, therefore, is to attempt to identify emerging trends relevant to the accomplishment of the council's mission, furthering the effective and expeditious administration of justice in the circuit. I suggest that there are at least two dominant trends that will shape the context for any long-range plan for the council.

First, as Judge Skopil's report clearly shows, Congress has its own vision of governance of the federal courts and is prepared to act to implement it if it finds the courts themselves to be wanting. The history of congressional action over the past fifty-four years reflects a tendency to look to the circuit councils as the agents of governance and to give them the power necessary to make them effective. The accretion of authority in the councils over the years has not so much been sought by the judiciary as thrust on it by Congress. As Peter Fish describes it in *The Politics of Federal Judicial Administration*, "Passivity, not activity, has typically characterized the work of circuit councils." (405) It is a reasonable interpretation of history that Congress enlarged the authority of the councils over the years for the purpose of having them deal with the problems of judicial administration Congress felt needed attention.

However we as judges may feel about the degree of power and authority the councils should exercise, it would be foolhardy to ignore this historical trend. There may be attractive constitutional and policy arguments in favor of preserving judicial autonomy rather than strengthening circuit councils. But history tells us that they will carry little weight in Congress. The recent creation of the Commission on Judicial Discipline and Removal is a straw in the wind.

This is not good news. One can hope that this analysis is wrong, but effective long-range planning needs to take account of this trend. Doing so could lead to premising planning on a much more activist council—i.e., a council that will not hesitate to exercise the full panoply of its powers to satisfy Congress that it is effectively addressing the problems of judicial administration in the circuit without the need for more legislation.

The lesson of history appears to be that if the judiciary doesn't take action on problems perceived by Congress to exist, Congress will; and there is no questions about Congress's perception of problems. Long-range planning, therefore, confronts the councils with a choice between

fighting a rearguard action in defense of ideals of judicial autonomy or demonstrating a willingness to assert the full range of existing powers to further the effective and expeditious administration of justice in the circuit.

III

The second dominant trend that will shape the context for long-range planning is the concurrence of declining resources and rising demands on the courts. No crystal ball is needed to see that trend continuing in the future. As for resources, the enormous burden of public debt and stubborn budget deficits is not going to disappear in the future. Its pressure on appropriations for the courts will grow. Although the courts appropriation has increased proportionally more than that of other government agencies in recent years, the indications are that this growth will not continue; even now the courts are encountering difficulty obtaining sufficient resources to fund the cost of defending indigents.

As for rising demands, Congress shows no sign of curbing its tendency to look to the courts as a cheap and politically attractive solution for many social problems. It is much easier to create a new crime or penalty or cause of action than it is to appropriate money to provide a remedy. Even now a steady stream of bills is moving through Congress that would bring into the federal courts new crimes, enhance penalties, and enlarge civil jurisdiction.

There is therefore an inexorable trend of increasing workloads and declining resources, and there is no reason to expect relief in the future. The relative decline in available resources to meet demands will have an increasingly adverse effect on the effective and expeditious administration of justice in the circuit. Long-range planning thus confronts the councils with another painful choice between their traditional role marked by restraint and a new activist role as the effective resource manager for the circuit.

This will not be music to the ears of federal judges concerned about the loss of autonomy. But meaningful long-range planning will need to face facts.

First, though one may hope that every district will manage its resources effectively, for purposes of long-range planning it cannot be assumed that this will invariably be true. For example, a district might

assign available courtrooms in such a way that some frequently remain dark while judges need to scramble to find others available, impairing judges' ability to hear motions and try cases promptly and efficiently. As funds for new facilities dry up, the assumption that each judge is entitled to his or her own courtroom may have to be reexamined. The need for resource management may become so urgent that the circuit council may have to act. Note that the council is given specific supervisory authority over the provision of courtrooms and chambers under 28 U.S.C. § 462.

Second, there may be great disparities of resources among districts in the circuit. For example, during the past year, the number of weighted civil and criminal filings per judgeship in the district in the Ninth Circuit with the lowest number of filings was just one-half that of the district with the largest number of filings. In other circuits, even more extreme disparities exist. Judge power is the most important resource in the system, but it is obviously in disequilibrium.

This is not a pleasant subject, but avoiding it does not make the problem go away. In more halcyon days, the circuit was able to deal with such disparities by depending on the good will and collegiality of the judges in responding to the chief judge's request to sit out of the district. Every effort should of course be made to continue in this way. But for the purpose of long-range planning, that may not be sufficient to assure the effective and expeditious administration of justice in the circuit. Long-range planning may well have to develop comprehensive solutions to ensure the most efficient use of the judicial resources of the circuit.

Though this prospect may sound threatening, it has its mitigating features. It could serve to distribute workloads more equitably and promote fairness among the judges and courts of the circuit, and this is an important objective at a time when the quality of life of federal judges is declining.

Assignment of judges to respond to the needs of the docket has been a concern for at least seventy years. As far back as 1922, Congress, at the urging of Chief Justice Taft, created the conference of senior circuit judges (the predecessor of the present Judicial Conference); one of its responsibilities was "to prepare plans for assignment and transfer of judges to or from circuits or districts where the state or condition of business dictates the need therefor." Section 292(b) of title 28 now

provides that "the chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit."

To come back to the point made above: in the long run, Congress can be expected to compel councils to take action, or to legislate on the merits, if it concludes that resources are not being managed effectively. The choice may be between having the councils act when necessary or leaving it to Congress to impose its own solutions. And clearly, the judiciary cannot and should not assume that new judgeships will continue to be created; there are compelling policy and economic arguments that may well lead to capping the size of the federal judiciary.

It is true that circuit councils are not necessarily the only potential agencies of governance capable of dealing with these kinds of problems that may arise in the future. And Congress may of course take courses other than forcing councils to act. But this does not diminish the reality of these trends or the need to address the challenges they pose for long-range planning.

IV

These trends pose a series of additional challenges for long-range planning, including the following:

1) It is obvious that the assertion by the council of the kind of authority here described will create severe tensions and potential conflicts. The council must move with caution to avoid crossing the line dividing administrative and adjudicatory functions. It needs to take great care to ensure that its actions will be consistent with preserving judicial independence and the integrity of the judicial process; the judiciary will gain little if in the process of attempting to solve its problems, it makes good men and women unwilling to serve. Judicial independence is an important value, but it must also be adaptable to evolving needs. Long-range planning will require great sensitivity if we are to preserve its essence without letting it become an obstacle to problem solving.

2) Long-range planning entails making a succession of normative judgments. The council cannot shirk the responsibility for making them. But those decisions will affect not only the judges in the circuit, but also the bar, the litigants, and the public. Long-range planning is

not necessarily a democratic process, but unless it seeks to build consensus, decisions may be difficult to implement. The process therefore needs to consider ways of obtaining appropriate input into decision making from others outside the judiciary who are affected by the decisions.

3) The likely expansion of duties and responsibilities of the council under the long-range scenario described will require that it address effective management techniques, structures, and processes. Judges will need to define their administrative role with a view to maximizing delegation to professional staff, reserving to themselves only policy decisions and resolution of significant disputes or claims relevant to governance.

4) The council's role may have to expand beyond actions within the circuit. The effective and expeditious administration of justice within the circuit is affected by developments outside. The sentencing guidelines are an example. The council might decide that it could play an effective role in advocating change, based on a study by the council of the impact of the guidelines in the circuit. The council, informed of the needs of the circuit, could perform an advocacy role before the Judicial Conference, its committees, and the Administrative Office. It could potentially be an effective source of information useful to Congress in considering legislation. Any action of this nature must be informed and carefully guided by considerations involving the national character of the federal judiciary and by the need to balance the interest of preserving cohesion against the obligation to further the requirements of the effective and expeditious administration of justice in the circuit.

To conclude, long-range planning may mean facing the prospect of taking a bitter pill to avoid having more obnoxious medicine forced down one's throat later. But the pill can perhaps be made less bitter through the application of wisdom and common sense.

The fundamental issue for the future of the council turns on its role in governance. Osborne in his book defines governance as "the process by which we collectively solve our problems and meet our society's needs." Governance can become oppressive, divisive, and counterproductive. Through carefully thought out and wisely administered long-range planning, governance can evolve from a top-down command structure into a consensual process to identify problems and collectively solve them.

Framework for Long-Range Planning in the Federal Judiciary

Otto R. Skopil, Jr.

Introduction

I have been asked to talk today about a framework for federal court planning. I will start by offering some general comments about the relationship between planning by the Long-Range Planning Committee of the Judicial Conference and planning in circuit councils.

My first point is perhaps the most obvious. To be effective, a planning process must fit the judiciary; the judiciary should not be tailored merely to fit some predefined notion of how planning should work. For planning to succeed in the judiciary we need to incorporate, not incapacitate, long-standing judicial values such as the independence of our judges. Judicial independence, which results in decentralized authority, will not hinder planning, nor will other features of judicial structure and governance. You cut the suit to fit the man, and not vice versa. Planning in the judiciary must accommodate and incorporate existing structure and values.

Planning Success

Second, I would like to comment briefly on success in planning. There are various measures of planning success. Some equate planning success with improving the system. There may be no objective measure for success in this sense. Others equate planning with achieving broad support for plans among stakeholders, that is, those who are affected by planning efforts or whose efforts affect the plan. Planning only succeeds if you achieve broad consensus on planning goals.

These two measures of success are related in an important way. If in our planning we address felt needs of our stakeholders—and of society generally—in a constructive way, we will obtain both system improvement and stakeholder support. However, if we fail to constructively address felt needs, we will produce plans which do little more than take up shelf space.

Federal Courts Study Committee Recommendation for Circuit and Conference Planning

Chief Judge Wallace and others have been thinking and writing about the need for judicial planning for some years. As you know, the most recent recommendations that the federal judiciary should engage in long-range planning were in the Report of the Federal Courts Study Committee. That report recommended that the Judicial Conference of the United States and the circuit councils *each* should engage in long-range planning. The recommendation regarding judicial council planning was as follows:

> *The councils should undertake long-range planning*
>
> Long-range planning by the councils, in addition to short-term operational policy making, is especially desirable in light of present trends toward decentralization of budgeting, administration, and space and facilities planning. The committee believes that all councils should give greater attention to long-range planning.

The judicial councils and the Judicial Conference have, I believe, separate responsibilities to plan and a joint responsibility to coordinate their respective planning as much as possible. I will raise some issues related to those separate and joint responsibilities. My comments deal with structural relations, first between council and district planning and then between council and Judicial Conference planning.

The Role of Council to Be Defined by Council

My point to this council, and to all courts, on their role in planning may be reduced to this: I and the Long-Range Planning Committee have no *a priori* notion of what role the councils or courts should play in planning, and I offer no advance blueprint for coordinating the roles of my committee and various councils.

After consulting its stakeholders, this judicial council should decide for itself what kind of planning it is capable of doing and can do profitably. The issues that are appropriate for planning by the councils are for the council to decide.

This judicial council has assumed a leadership role in planning, and its efforts should help illuminate for other circuit councils and for my committee the kinds of planning issues best handled by circuit councils. Likewise, the long-range planning process of this circuit's court of

appeals, and the broader planning process to be launched at our Judicial Conference later this summer that will stimulate long-range planning at the local level, should illuminate the types of issues best dealt with in local plans.

In effect, this circuit is a laboratory for other circuits and for the national planning process in general. I believe the efforts of the Ninth Circuit will in large part define the kinds of issues most appropriate for district, circuit, and council planning.

Relationship Between Circuit and District Plans

You might give some consideration to the relationship between the plans of various components of this circuit. Should circuit planning operate in parallel with district planning? Will these plans "nest" under some umbrella of shared assumptions, issues, or goals, and if so, will the council provide that umbrella? Will the districts be asked to include in their plans specific steps to implement general administrative goals established by this council?

A short example may clarify these questions. Perhaps a general goal of delay reduction could be established by the council for all courts in the circuit, and individual courts might then be asked to determine for themselves how delay can best be dealt with in their jurisdiction. Or, will individual courts, acting autonomously, be asked to identify issues which should be addressed in their local plans? These are structural issues for the council to consider at the outset of this circuit's planning process. I carry no brief on what role should be played by the various levels of authority within our circuit.

On a process level, my committee wants to help, not hinder, your planning as well as planning at all levels of the judiciary. For us to help, you must identify for yourselves, and for us, what you need from us to do effective planning. There are a number of support activities that, for the sake of efficiency of resources, should probably be done only once. Projections of future population trends and caseload forecasting are examples. If we can provide the support you request, we will provide it.

Issue Allocation Between National and Regional Planners

The Federal Court Study Committee had some interesting suggestions regarding the kinds of issues which should be the subject of planning by the circuit councils and by my committee at the national level. For instance, the working papers for the FCSC made the following suggestion regarding the task of my committee:

> [The committee should] concern itself with matters related to the overall activities of the federal judiciary rather than isolated problems. That is, it should, for example, be concerned with the manner in which the judiciary proposes and plans for the addition of new judgeships and should not be concerned mainly with the need for a new judge in a certain district or the need for a courtroom for that judge's use. It should develop policy proposals capable of broad application and should not be concerned with specific and isolated problems.

The report stated that planning in circuit councils is of increased importance because of "trends toward decentralization of budgeting, administration and space and facilities." In assuming or allocating planning responsibility to my committee, or to circuit councils, or to districts, we should ask ourselves whether the nature of the issue is such that it should be dealt with on a national, circuit-wide, or local level. The planning literature concludes that there are appropriate levels of control for most issues, and I expect that will prove true in the judiciary as well.

For instance, some problems may be local but will need to be solved on a national level. An example might be the reported misuse of bankruptcy filings by tenants in the Los Angeles area in an effort to avoid eviction. That problem may be most severe in Los Angeles, but if the problem is to be resolved by statutory amendment, the amendment would apply to all courts, not just those in Los Angeles. This is the kind of problem which is identified locally and dealt with nationally.

On the other hand, even though some problems are national ones, they need to be solved on a circuit-wide or district-wide level. Docket delay comes to mind. While my committee or this council might identify delay as a system-wide problem, and perhaps establish delay reduction as a system-wide goal, it seems to me that specific implementation of this goal depends on local court conditions and is best decided locally.

National Issues Planning and the Opportunity for Integration

At the same time, as you proceed with your planning efforts my committee will develop a national plan. We hope to develop a process that recognizes the unique mission of the federal courts and that incorporates established system values, but that also establishes system-wide goals. I would appreciate the thoughts of this council on how best to structure and proceed with national planning.

A national plan, a document the Chief Justice has specifically asked me to produce, is essential but it will not be the only planning instrument produced by the judiciary. Although we have no blueprint for how our planning effort will relate to your own, it could be that our plans will be on parallel tracks, more coincidental than integrated. On the other hand, some integration of our plans may be inevitable, if only for the reason that our stakeholders clearly overlap.

I am pleased that it is with my own circuit that I will have the opportunity to coordinate national and circuit planning. No doubt, cooperation will be easiest with those of you that I have known and worked with for so long. I do not now know, and we may not know until this council and my committee complete a planning cycle, whether our plans should be "nested" on all, some, or any issues. To repeat what I said earlier, I do believe that if we fail to address problems felt by those we serve, we will not produce plans which are successful by any measure.

Some Comments on Why Planning Can Be Done

I would close with some brief comments on planning obstacles. We have heard much about why the judiciary cannot do planning, and some of these reasons, to me, are in fact reasons to engage in planning.

1. *We lack autonomy in case selection* (or over what Judge Wallace has called input). We don't know what Congress will expect of us in ten years. This may be true, but perhaps our plans should contain the overarching goal of improving institutional relations with Congress. Our lack of autonomy is not an excuse to avoid planning. It instead directs us to issues on which planning might be most important.

2. *We are too busy with caseloads to plan.* This is like saying we are too busy to plan for our own retirements so someone else will have to do that for us. I believe we should expect more of ourselves. If we do not

involve ourselves in planning for our future, others will plan for us, and we might not like the results. We do important work in the present, but we need to look ahead and actively work toward our future.

3. *A system without hierarchical administrative structures cannot plan effectively.* I addressed this point earlier. Successful judicial planning will preserve and accommodate independence. Good planning requires achieving consensus. While we lack rigid hierarchy, we have in place institutions such as the circuit conferences, the circuit councils, and the Judicial Conference which provide fora to debate ideas and to achieve consensus.

4. *We can't forecast caseloads or our future with any precision.* (As if a company like Kodak knows precisely what the consumer will require of the photography market.) I am not yet sure what we can foretell about the future. Certainly, our forecasting can be improved, and Bill Schwarzer and the FJC are devoting some effort to telling us what we can realistically expect from forecasting. Forecasting may not be able to predict with precision the exact number of cases to be filed in the year 2015. However, it may help us identify emerging trends or identify the types of cases that are likely to increase or decline over time.

Also, there are several internal and external forces which can be identified and for which effective responses must be fashioned. Sentencing disparity, for instance, was known to the judiciary for years. Had we dealt with it more effectively ourselves we might have avoided sentencing guidelines. There is much we cannot foretell, but there are many trends which are known or knowable to us if we only look. Above all, we can and must define for ourselves the "judicial future" we should work to establish.

In short, I think we need to plan and that we can plan and plan effectively. Similarly, I think that we will coordinate if not integrate our planning efforts at all levels of the judiciary. On some issues we will have greater success than on others.

Nonetheless, as responsible stewards of the federal judicial system, we are obligated to plan for a future that will preserve the values and strengths of our judicial system and that will protect our status as an independent and coequal branch of the national government.

Strategic Planning: A Process Overview

Charles W. Nihan

I have been asked to talk briefly today about the structure and elements of a long-range plan.

Let me start with basics. Planning deals with *ends* and *means:* agreeing on ends and identifying the means by which to achieve these ends. A plan is merely a record of that process—it memorializes an organization's decisions about its future and it serves to communicate these decisions to others within and outside the organization.

Plans become out of date quickly because events unfold in unexpected ways. Chief Judge Wallace made this point nicely in his paper on the future of the judiciary, where he stated, "It is not enough to develop a plan. There should be a method to reevaluate the plan as circumstances change, new facts are found, and new projections are developed."

That we cannot accurately predict the future should not deter us from planning. Of course it is impossible to forecast the future. That fact, however, is common to all organizations, and it in no way negates the obligation of leaders to improve their organization consistent with its core values and their shared strategic vision.

Many planning experts say that the planning process itself is often more important than the plan it produces. It is the planning process that endures—even grows in importance—in an organization.

Structure

The structure of most long-range plans shows a progression from broad values to specific actions. The focus is initially on ends and secondly on means. That said, long-range plans vary greatly in structure and content.

Most effective plans, however, contain five basic elements.

1. Statements about the values and philosophies that guide the organization.

2. Assessments or descriptions of the current situation faced by the organization.

3. Statements about desired outcomes and how the organization will address the future.

4. Implementation considerations.

5. Administrative information.

While these elements are common to effective plans, there is little agreement about their proper sequence or, for that matter, about the necessity of including every one of them in a plan. Planning bodies, including this council, are free to tailor their plan to meet particular needs. As the saying goes, you cut the suit to fit the man, not vice versa. In sum, there is no fixed structure or established formula that need be followed to produce a successful plan.

I would like to comment briefly on these five elements.

1. *Values and philosophies.* Selection of appropriate planning goals is guided by collective values and beliefs. In most planning processes, underlying values and beliefs are reflected in the following kinds of statements:

- a mission statement that defines the core purpose and boundaries of the organization and its fundamental and continuing aims;
- a vision statement that describes what the organization would look like if it achieves its mission and its full potential;
- a statement of guiding principles that describes the beliefs or idealistic operating guidelines for daily actions, such as "we devote our attention to customer needs."

2. *Current situation.* Plans might be seen as road maps to the future. To use a map you must know your starting point as well as your desired destination. Long-range plans discuss the present state of the organization in what planners frequently call a "situation assessment." Such a discussion covers:

- an evaluation or discussion of the current situation or trends, including external factors (e.g., demographics) and internal factors (e.g., resources);
- a description of the issues, problems, or needs facing the organization;
- a description of the assumptions or forecasts about the future on which the plan is based.

3. *Desired outcomes.* Here is the meat of the planning process. It describes what the organization hopes to accomplish in the future. The plan presents:

- the organization's goals, i.e., long-term results which support the mission,
- the organization's strategies for achieving the goals, i.e., a summary of the approach to be taken over the time span of the goal;
- the objectives, i.e., specific actions and steps to accomplish the goals.

Goals, strategies, and objectives are usually presented topically within the plan.

Completing the list of elements, we have:

4. *Implementation.* If a plan is to produce results someone or somebody must be charged with its implementation. Otherwise all you have is a wish list that occupies shelf space.

5. *Administration.* Fulfilling a plan's documentary role, planning groups often add historical or procedural information.

Developing Mission Statements

A mission statement should reflect the core values of the organization. It provides the philosophical context for the planning process. It should be succinct, motivating, and easily understood. A mission statement is not a stand-alone product. If you develop a mission statement that is not supported by goals and specific steps or tasks for accomplishing those goals, you will have achieved little.

When establishing a new planning process, some organizations leave the task of developing a mission statement until after they have achieved consensus on a number of goals.

A mission statement presents both identity and philosophy. It has three major purposes:

1. Identify who we are as an organization.
2. Identify the needs we address or people we serve.
3. Identify what we stand for.

A key term is "identify." Organizations use their mission statement to tell others what is—and what is not—their core purpose.

The mission statement's role in the planning process is twofold:

1. It provides a point of reference for decisions about issues addressed in the plan. It can be used as a guide to settle disputes, to ensure consistency in developing goals, or to provide guidance about implementation priorities.

2. As is true with planning generally, the literature concludes that the process of developing the mission statement is frequently more valuable than the final statement itself. The process results in consensus on the organization's primary purpose.

Writing a mission statement where none has existed before can be a frustrating experience. Common complaints are:

"I know what we're all about; I don't need to have it written down."

"This statement is so vague it could apply to any organization in the world!"

Some organizations spend years developing and perfecting their mission statement and, frankly, when you read them, they appear that the drafting should have taken about a quarter of an hour. Nonetheless, almost all planning experts conclude that mission definition is essential.

Chart 2 shows four steps in developing a mission statement. [Chart 2 is the only one of the charts included in this booklet.] A mission statement for this Judicial Council should reflect your collective ideas about the council's purpose as well as the purpose of the courts that make up the circuit. Developing it may not prove to be as easy as it first appears.

A mission statement cannot confer authority or legitimacy that does not already exist by statute, regulation, or custom. If you are not perceived as the body responsible for charting the course for the men and women who make up your circuit, your plan simply will not be accepted.

To be useful, a mission statement must reflect the core values of the federal judicial system generally and the Ninth Circuit specifically. That may pose something of a problem for you. Even though those of you on the council are arguably representative of all of the men and women who make up the Ninth Circuit, it may be that you are not widely perceived to be representative. Just as judges and lawyers recognize that the appearance of justice is as important as the reality of justice, so too must you appear to represent the values and core beliefs of others in the circuit if they are to feel a personal stake in the plan you produce.

I believe that those of us engaged in planning frequently fail to appreciate the initial response of people to our announcements that we intend to prepare long-range plans. We say "plan" but people hear "control." We say planning will "increase" future options but most

Chart 2

Steps in Developing a Mission Statement

Step One: Examine statments and documentation from higher authority as the frame of reference for your statement.

Step Two: Define the characteristics and qualities of the Judicial Council on each of the following dimensions:

- its constituents and stakeholders
- the needs met, functions served, and problems addressed
- the products and services provided
- the values and standards that underlie your operations

Step Three: Develop a core purpose statement that meets the following criteria:

- does it support the frame of reference?
- does it address in some way the four dimensions of Step Two?
- is it succinct? readable?
- is it challenging? motivating?

Step Four: Check for group consensus on the statement.

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people initially believe it will "limit" future options. We planners say, in all good faith, that our actions are for the overall good of the organization. However, during my childhood I recall that just about every action that was preceded by the statement that it was for my own good turned out to be a rather unpleasant action in my eyes. My point is that planners should expect a good deal of skepticism from colleagues at the outset of the planning process.

I think it is very important for you to encourage broad comment on your draft mission statement as well as on the planning goals you establish before publishing your plan. If your plan is to be effective, it must be accepted by those whose actions you hope to guide. Stated somewhat differently, if those to be guided don't agree with the core values expressed in your plan they are not likely to follow it.

Chief Judge Wallace recognized the importance of consensus when he noted the need for those developing plans "to develop a basic trust" with all the men and women of the Ninth Circuit.

Finally, I encourage you to think broadly when you think of those who will be affected by your plans. Obviously included in this group are members of the bar and the public who come to the courts for the resolution of their disputes. I think you should make a special effort to reach civil rights groups and public interest groups which might be concerned by the establishment of federal court planning goals without notice and the opportunity for public comment. Since our only goals are the improvement of the court, and the service the court provides the bar and public, it seems sensible to involve those who might be affected at an early time.

Developing Goals and Objectives

Clearly, a planning process does not stop with the production of a mission statement. If it did, nothing meaningful would have been accomplished. It must be followed by the establishment of specific goals that will allow the organization to accomplish its mission. These goals, in turn, are divided into discrete objectives and tasks that can be assigned to individuals and have their implementation success monitored.

Here I would like to repeat a point that Judge Skopil made earlier. You must, at the very outset of your planning effort, decide what the

relationship will be between your plan and the plans of courts or discrete court units within the circuit. Your decision in this regard will significantly affect the structure and content of your plan.

If you intend to establish the planning agenda for others within the circuit, but at the same time encourage local innovation in implementing this agenda, your plan should articulate broad goals and not attempt to dictate implementation details. In effect, your plan would define what is to be accomplished and plans prepared by others within the circuit would define how it will be accomplished locally.

Planning literature is replete with "how-to" books. There are a number of commercially available training courses to teach skills in goal and objective development. However, in my opinion, once you agree on basic terminology that will allow you to communicate, the best way to develop goals and objectives is simply to start.

To close, let's look at two examples of state judicial planning that are contained in your handout material. [The two examples referred to are set out on the following pages.]

Example Adapted from Virginia Court Plan

Mission	Vision
To provide an independent, accessible responsive forum for the just resolution of dispute in order to preserve the rule of law and to protect all rights and liberties guaranteed by the United States and Virginia Constitutions.	In the future, all persons will have effective access to justice, including the opportunity to resolve disputes without undue hardship, cost, incovenience, or delay. The judicial system will be managed actively to provide a wide array of dispute resolution alternatives that respond to the changing needs of society. The judicial system will fulfill its role within our constitutional system by maintaining its distinctiveness and independence as a separate branch of government.

Issue	Goal	Objective
Access to courts	Provide for physical accessibility to all court facilities by the end of 1994.	1. Adopt and implement standards for courthouse facilities and establish a plan for periodic review of such standards. 2. Conduct an evaluation of all state courts for the purpose of identifying physical barriers to effective access. 3. Develop an action plan for eliminating barriers identified through evaluation.

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Example Adapted from North Carolina Court Plan

Mission	Vision
To protect and preserve the rights and liberties of all the poeple as guaranteed by the Constitution and laws of the United States and North Carolina, by providing a fair, independent, and accessible forum for the just, timely, and economical resolution of their legal rights.	The Judicial Branch meets the challenges of the future so that all persons have convenient and equal access to the courts; disputes are fairly and expeditiously resolved; and that court organization, jurisdiction, and services are efficient and uniform across the state.

Issue	Goal	Objective
Court organization and operations	Resolve all disputes fairly and expeditiously.	1. Develop efficient case management procedures, to include: time standards for case processing, case scheduling, standards for court performance. 2. Implement civil case jury reform, to include possible changes relating to size, unanimity, and selection of juries, and to work toward selective expansion in the use summary jury trials.

The Future of the Judicial Council of the Circuit

J. Clifford Wallace

With the great changes which have occurred in the judiciary in the last two decades, it is time for us to take a close look at the nature and role of the Judicial Council of the Ninth Circuit in confronting the challenges which are before the judicial system today and in the foreseeable future. I admit I have few answers but quite a few questions.

The issue is a current one. Most of the time at the recent meeting of the Conference of Chief Circuit Judges was devoted to discussing similar issues.

I believe that we must start by placing the issue of the role of the council in the context of overall judicial governance. The statutory basis of that governance establishes a Judicial Conference of the United States chaired by the Chief Justice and composed of chief circuit judges, elected district court judges, and representatives of specialized courts. Essentially, the Judicial Conference does not derive its direct power from any specific grant of authority to issue orders—because that power is given only in limited situations. Rather, its power comes from two sources apart from the usual order-issuing authority: its members are those judges who are largely responsible for governance, and it gives direction to the judiciary's bureaucracy, the Administrative Office of the U.S. Courts.

Another statutory element of judicial governance is the Judicial Conference of the Circuit. Its statutory responsibility is to consider the business of the courts of the circuit and to recommend improvements. Once more, this conference possesses no power to issue orders.

On the other hand, the judicial council of the circuit is specifically granted power to issue all necessary orders for improving the expeditious and efficient business of the circuit. It is this statutory grant of power that makes the judicial council of the circuit unique. Not even the district court has general power to issue judicial administration orders—its authority is limited to the adoption of rules.

From this outline, it is clear that an overall philosophy has developed around three values. The first is the value of decentralization.

The general administrative power was granted regionally to the judicial councils. At the time Chief Justice Hughes appeared before the Senate, inquiry was made whether he wished to have that power vested in the Judicial Conference of the United States. But he concluded that the power should be decentralized in regional foci—in the circuits.

The second value is local control for resolving local problems. Carried to its extreme, this would mean district-level, not circuit-level, decision making. The Congress, however, determined that judicial administration policy should be developed in large measure in the Judicial Council of the Circuit. There certainly is a substantial difference between decision making at the circuit level and decision making at the national level. It is far more likely that there will be real local control in deciding administrative issues when that responsibility is given to the circuit rather than to a national body.

The third value is participatory decision making. With judicial councils composed of district and circuit judges, the decision-making process more closely approximates widespread representative participation. Indeed, because of open meetings, any affected individual can be present at a local level to hear the discussion of an issue in which he or she has an interest.

I turn next to problems with the role of the judicial council. The first is the growth of administrative decision making at the national level. The Administrative Office has grown substantially. I do not find this, in and of itself, a problem, and I do not fear it. Indeed, I believe the bureaucracies are appropriate and necessary. But given that fact, it must be pointed out that with the growth of a large bureaucracy at the national level, decision making at the circuit level can become less relevant.

In addition, the Administrative Office has a committee advisory structure which provides it with advice from specialized groups. The very nature of that advice circumvents the judicial councils.

Finally, there has been a substantial increase in the power of the committees of the Judicial Conference of the United States. Because of the large number, and increasing complication, of issues, the Conference itself does not have the time to conduct in-depth analyses and discussions. Necessarily, the decision-making power is transferred to some extent to the committees which report to it.

While this type of growth is inevitable, the principle of decentrali-

zation requires some counterbalance, or the invariable increase in decision making at the national level will continue.

A second challenge for the role of the judicial council is the growth of the judiciary over the last two decades. Judges by their nature like to decide cases. Law clerks will give assistance, but the judge wants to have his or her hand on the final product. Many judges have difficulty switching from that decision-making approach to a judicial administration approach in which they should delegate a large number of decisions to others without retaining direct involvement.

In addition, there are many new participants in the judiciary. I have watched the change from the referee to the bankruptcy judge, and from the commissioner to the magistrate judge. These are more than just changes in names. The changes are in the type of business and the number of participants. The judicial council must involve all of the participants in seeking solutions to the problems.

A further problem is the courts' increased jurisdiction. This has resulted in courts becoming more involved in the decisions of society, and, necessarily, has complicated judicial administration. Relations are more complicated now between the circuits and districts and between the federal and state courts. The larger the system, the more difficult the administrative problems.

Fortunately, one problem has been solved. The judicial council of the circuit was originally composed of circuit court judges. Thus, from the view of the district judges, the members of the council—with responsibility for judicial administration—were the same judges who have case-decision authority. As a result, the circuit judges reviewed and corrected the district judges not only on case matters, but also on administrative matters. There was understandably a feeling of disquietude. This had to be changed in order to make the council work effectively. The movement towards this change occurred as a result of a reaction to the Nunn Bill, which provided for the establishment of a national commission which would have the power to remove judges for cause. The bill actually passed the Senate. [S. 1423, 95th Cong., 1st Sess. (1977).] In response, I argued that the judicial council of the circuit had adequate authority to discipline judges when necessary, and that such a national commission was unnecessary. In order to gain acceptance of that suggestion, I proposed—I believe for the first time—an equal representation of circuit and district judges on the council.

[*See* Judicature, vol. 61, no. 10 (May 1978).] The Ninth Circuit was the first to implement this, by order adopted in 1980. It was not until 1990 that the Congress mandated equal participation of district and circuit judges. Now this circuit-judge domination impediment has been removed nationwide.

How does the judicial council meet this administrative challenge? We must start with our statutory grant of power found at 28 U.S.C. § 332(d)(1), wherein we are required to "make all necessary and appropriate orders for the effective and expeditious administration of justice within [this] circuit." We must begin by taking seriously this stewardship responsibility that has been given to the judicial council. I do not propose that the council start issuing numerous orders. My experience has been that more is gained in judicial administration by teaching than by ordering. What I do suggest is that the council has a responsibility, and it should carry it out in the most productive and effective way.

Therefore, we should look again at the nature of our council. Is the size of the council optimum? We now have four circuit judges, four district judges, and four observers (senior circuit judge, senior district judge, chief bankruptcy judge, and magistrate judge). Is the composition of the council appropriate? What about the tenure of council members? Presently, they serve for two years except for the three-year term of the district judge who serves on the council by reason of his election to the Judicial Conference of the United States. Our senior district judge, senior circuit judge, chief bankruptcy judge, and magistrate judge observers serve for one year. Are these terms long enough? We need to face up to whether council members will take the time necessary for meaningful governance. Will they do so?

The next issue is the role of the circuit executive. I think there is no question that the role of the staff should be to handle administrative matters, to the extent possible, so that judges can spend their time deciding cases. But the judiciary is somewhat unique, and certain values should be examined. The circuit executive should be the executive for the Judicial Council of the Circuit—not for the court of appeals. This is not to imply, however, that the court of appeals is exempt from the jurisdiction of the judicial council. While the vast majority of the circuit executive's work will necessarily be at the district level, he or she has the same responsibility to the court of appeals as to any other court in

the circuit. But how do we balance this activity so that the council is involved to the extent it should be? To what extent should the chief judge be delegated to act for the council? The role of the chief judge is changing, and his or her role in relationship to the Judicial Council of the Circuit should be examined and perhaps defined.

For example, the space and facilities questions are critical. How much of the decision making should be delegated to the circuit executive? With what limitations? With what reporting responsibility?

With that introduction, I turn now to my assigned topic: the ideal Judicial Council of the Circuit. If the council is to be a counterbalance to national growth, it must do more than merely react. In what areas should it do more than react?

What should be the role of the council in national policy development? It represents a cross-section of the Article III judiciary, and it has a general stewardship responsibility. Thus, the council is perhaps in a better position to offer balanced advice than committees of the Judicial Conference of the United States and committees of the Administrative Office. How can that advice be given? How can it have more influence with the Judicial Conference of the United States and with the Administrative Office?

What responsibilities should be given to the judicial council? It has the power to issue orders. Should more jurisdiction be granted to the council?

Should appointment of Administrative Office committee members be made by the judicial councils? Should the councils make recommendations to the Chief Justice pertaining to membership on committees of the Judicial Conference of the United States?

Should councils have a role in establishing policy or reacting to proposed legislation? For example, the Judicial Discipline Bill was a reaction to the Nunn Bill which, as I said earlier, would have placed the power to remove Article III judges in a Washington, D.C., commission. The initial draft of the discipline bill was the work of Judges Browning and Hunter and me, but should it have come from a council? The development of the bankruptcy appellate panel involved a political policy with which our council wrestled. Are there similar initiatives the council should take? The task of trying to solve the problem of frivolous case filings by "bankruptcy mills" in the Central District of California has been undertaken by the council. Are there

other concerns that the council should consider? The council is presently exploring whether it should take a role in assisting tribal courts to improve and in examining bias in the courts. Are these proper ventures for the judicial council?

It seems to me that the present move toward decentralization should focus on the judicial councils of the circuits. They can carry out the necessary oversight far better than it can be done from Washington, D.C. All judges would be closer to the decision maker with this localized oversight responsibility. Because of the nature of the council, local judicial administration activities are reviewed by judges who directly represent all judicial officers, as all council members sit in a representative capacity.

If the council is to fulfill its mission, we must look anew at the basic role of judicial council meetings. The council now spends too much time on detail. The council should devote more time to developing broad policy. Operations should be delegated. The council needs to take time to consider how the system can be improved within the jurisdiction of the council. We need to focus on the right priorities.

We have not yet gained the great benefit of the cooperation that can occur between the judicial conference of the circuit and the judicial council of the circuit. The circuit conference has the responsibility to review the business of the court and to give advice. To whom should it give advice? Largely it gives advice to the circuit council. Thus, all of the judicial officers and lawyer representatives can consider issues of judicial administration at the conference and make recommendations to the council. Thus, this large group, including all judicial officers, is given the opportunity to participate fully in the decision process as they come together in conference to make recommendations. This model is based upon finding solutions to problems from the bottom up rather than a filtering down of decisions from above. Many of the larger issues can well await full ventilation at the circuit conference before the council takes action. The council just needs to look far enough down the line to determine the major issues on which to seek advice from the conference. This way, the council can concentrate on the big-picture goals with circuit-wide advice, and make substantial progress in the administration of justice in the circuit.

To do this, I suggest we consider expanding the role of the council's executive committee to handle details delegated by the council. All

members of the council do not need to be involved in all decisions. The council can delegate much of its business to the executive committee. Executive committee decisions can be reported on a consent calendar, allowing any member of the council to call for discussion and reconsideration of those decisions.

There should be a clear delineation as to when the chief judge can act for the council. Many issues do not even need executive committee action.

We should look again at the role of the circuit executive and reexamine what that office is presently required to do. We must gain all of the benefits of having professionals without abdicating the responsibility of the council. Many of the duties can be carried out if we have established controlling policies. Other decisions may need some judge involvement, either by the chief judge, the executive committee, or the council. By delineating those tasks, we can make better use of our professional staff.

We need to improve our education of judicial officers as to the role of the council. The judges know very little about what the council can and should do. That education is vital. It is more than just advising them about council decisions—we must teach them the basic role of the council itself.

We should start the process ourselves by deciding what the role of the council is and charting a course to fulfill it. This means establishing a mission for the council. Once we decide our council mission, we need to develop a long-range plan so that the work of the council, step by step, develops to the place where it actually achieves its mission. We could develop actions plans from this long-range plan, which would provide the staff with short-range priorities and goals. These goals would be aspirational, yet reachable.

I believe the council should become a resource for all courts. Its role should be to assist courts and judges to improve, so that they can do their best to administer justice.

The council should strive to develop a feeling of trust and confidence among all judicial officers. To do so, we must demonstrate our capability by how we function, so that the council's role is accepted. The council must develop normative principles which it applies to all problems. The council should apply neutral principles to every court—circuit, district, bankruptcy—so that the council never acts merely

because of the supposed authority, position, or prestige of the judge who makes the request. All judicial officers must feel that the council's decisions are based upon principle. Until that occurs, we will not have developed the feeling of trust which I believe is essential in order for the council to achieve the ultimate goal of improving the administration of justice in this circuit.

About the Federal Judicial Center

The Center is the research and education arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division provides educational programs and services for non-judicial court personnel such as those in clerks' offices and probation and pretrial services offices.

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